No. 86-842

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

G. D. SEARLE & COMPANY,

Petitioner,

v.

SUSAN COHN and WALTER COHN, her husband, and ATTORNEY GENERAL OF NEW JERSEY, IRWIN KIMMELMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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8 APP

QUESTION PRESENTED

Whether principles of "retroactivity" can permit the enforcement of a state statute that unconstitutionally denies the statute of limitations defense to out-of-state corporations that are not "doing business" in a state in hundreds of pending and *yet-to-be* filed civil cases when:

(a) courts will thereby create the very discrimination that the Commerce Clause has been held to prohibit, and

(b) it is undisputed that the judicial decisions invalidating the tolling statute applied "well-settled precedents" of this Court, that there previously had been conflicting judicial decisions and controversy over the statute's applicability, and that the decision invalidating it therefore was not an "avulsive change" in the law (*Hanover Shoe, Inc.* v. *United Shoe* Machinery Corp., 392 U.S. 481, 499 (1968))?

STATEMENT REQUIRED BY RULE 28.1

Petitioner G.D. Searle & Co. is a wholly-owned subsidiary of Monsanto. In addition to its other wholly-owned subsidiaries, Monsanto has an ownership interest in Fisher Controls International, Inc. In addition to its wholly-owned subsidiaries, Searle has ownership interests in the following: Laboratoires Searle S.A., Searle India Ltd., Lorex Pharmeceutica B.V., Searle Pakistan Ltd., G.D. Searle (Philippines) Inc., Nutrasweet A.G., and Lorex Pharmaceuticals Limited.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Third Circuit, as amended, (Appendix to Petition for Certiorari ("App.") 2A-15A), is reported at 784 F.2d 460. The original opinion of the Third Circuit (App. 17A-33A) and the order of March 12, 1986 that modified it on denial of rehearing (App. 35A-37A) are unreported. The opinion of the District Court (App. 39A-51A) is reported at 598 F. Supp. 965. The opinion of the Third Circuit issued after this Court's prior decision in this case (App. 53A-55A) is reported at 677 F.2d 301.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on January 7, 1986. The Court of Appeals modified its original opinion and denied petitioner's timely petition for rehearing on March 12, 1986. On May 16, 1986, Justice Brennan extended the time for filing this petition to and including July 12, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS

The United States Constitution, Article I, Section 8, Clause 3:

> "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . ."

New Jersey Statutes Annotated, 2A:14-2

> "Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this State shall be commenced within 2 years next after the cause of any such action shall have accrued."

New Jersey Statutes Annotated, 2A:14-22:

> ". . . [I]f any corporation or corporate surety not organized under the laws of this state against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which . . . such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

STATEMENT OF THE CASE

This is the second time that the Court has been presented with this case and the question whether New Jersey can constitutionally discriminate against out-of-state corporations that are not registered to "transact business" in New Jersey by denying them the same statute of limitations defense that is available to their domestic New Jersey competitors and other companies doing business in the State. In *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404 (1982), and companion decisions, this Court vacated the earlier decisions of the Third Circuit and New Jersey Supreme Court that had upheld New Jersey's Tolling Statute and remanded for a determination whether this discrimination against wholly out-of-state corporations violates the Commerce Clause.[1] 455 U.S. at 414.

The Court did not itself decide then this Commerce Clause issue because the question whether the statute was a *per se* violation of the Commerce Clause was "clouded by an ambiguity in state law." 455 U.S. at 413.[2] It had been unclear whether the only way that an out-of-state corporation could obtain the statute of limitations defense was to waive its Commerce Clause rights not to register to do business in New Jersey and thereby consent to personal jurisdiction in New Jersey courts in any and all cases (including those in which long-arm jurisdiction would be unconstitutional). 455 U.S. at 414. The Court's remand also encompassed Searle's alternative

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[1] Over Justice Steven's dissent (455 U.S. at 420-421) the Court held that the Tolling Statute was minimally rational and did not violate the Equal Protection or Due Process Clauses. Chief Justice Burger and Justice Powell also dissented on the ground that the Court should have itself decided the Commerce Clause issues. *Id.* at 414-420.

[2] The Court also suggested that Searle may not have properly preserved its Commerce Clause claim and directed the lower courts to consider this issue. On remand, the Third Circuit held that Searle's claim had been preserved. App. 54A.

claim that, even if not *per se* invalid, the State had not met its heavy burden of proving the "unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." [3]

On remand, the New Jersey Supreme Court held that the Tolling Statute did require out-of-state corporations to waive their federal constitutional rights not to register to do business in order to obtain the defense of the statute of limitations. Both the District Court and the New Jersey Supreme Court thus held that the application of the statute to these corporations was a *per se* violation of the Commerce Clause under one hundred years of decisions of this Court.

However, the Third Circuit (like the New Jersey Supreme Court) has now held that this unconstitutional statute can nonetheless be applied to deny out-of-state corporations the statute of limitations defense in hundreds of pending cases and in an indeterminate number of yet-to-be filed cases — under principles of "retroactivity" derived from *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).

This holding squarely conflicts with the Second Circuit's decision on the identical issue. The "retroactivity" principles applied by the Third Circuit are further in conflict with those applied by the First, Fourth, Fifth, Seventh, and District of Columbia Circuits and with a number of decisions of this Court.

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[3] *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). The Tolling Statute is designed to protect plaintiffs who could not reasonably locate a foreign corporation "in the sprawling country beyond New Jersey's borders" and serve it under the long-arm rule. *See Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 295, 416 A.2d 372, 380 (1980), *vacated on other grounds*, 455 U.S. 985 (1982). Because this interest could be achieved by tolling the statute of limitations *only* during the period in which the plaintiff could not reasonably have located and served the foreign corporation, Searle argued that there obviously was a nondiscriminatory alternative to the indefinite tolling. 455 U.S. at 411.

Background. Like many States, New Jersey has long had a statute that "tolls" the running of the statute of limitations during periods in which a defendant does not reside in the State. However, as in other States, the question whether the New Jersey Tolling Statute could be applied to deny the statute of limitations defense to unregistered out-of-state corporations (like petitioner) that are amenable to long-arm jurisdiction did not arise until the 1960s and 1970s. Indeed, New Jersey did not have a long-arm rule that would permit it to assert jurisdiction over those corporations until 1958.[4]

Until 1980, the only judicial decision in New Jersey that addressed the application of tolling statutes to out-of-state corporations was a trial court decision holding that such tolling statutes could not be validly applied to such corporations.[5] During this period, moreover, the New Jersey Supreme Court had explicitly *reserved* decision on this question, noting the "contradictory results" that trial courts had reached.[6] Further, while the question was open in New Jersey during this period, the overwhelming majority of state courts had held that identical tolling statutes could not be applied to out-of-state corporations that are amenable to long-arm jurisdiction. *Annot.*, 55 A.L.R.3d 1158, 1163 (1974).

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[4] *See Coons* v. *American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921, 924 (1983).

[5] *Ferraro* v. *Ferro Trucking Co.*, 72 N.J. Super. 519, 179 A.2d 74 (Law Div. 1962).

[6] *Lemkey* v. *Bailey*, 41 N.J. 295, 196 A.2d 523, 526 (1963). As the New Jersey Supreme Court stated in 1984:

> "Until 1980, in *Velmohos* v. *Maren Eng'g Corp., supra*, 83 *N.J.* 282, 416 *A.*2d 372, this Court had not addressed the effect of *N.J.S.A.* 2A: 14-22 on corporate defendants, having specifically declined to do so in *Lemke* v. *Bailey, supra*, 41 *N.J.* at 301, 196 A.2d 523." *Coons* v. *American Honda Motors Co.*, 96 N.J. 419, 476 A.2d 763, 771 (1984).

In 1980, the New Jersey Supreme Court held, over two dissents, that the New Jersey Tolling Statute could validly be applied to deny the statute of limitations defense to such out-of-state corporations. *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980). However, this Court thereafter vacated the decision in *Velmohos* and remanded for reconsideration in light of *G.D. Searle & Co.* v. *Cohn*. *See* 455 U.S. 985 (1982). Thus, it was not until the subsequent decisions after this Court's remand (see pp. 8-9, *infra)* that there was a definitive holding, and it was *against* these applications of the Tolling Statute.

The Present Suit. This case arose during this period of uncertainty and of "contradictory" New Jersey decisions. In it, respondents Walter and Susan Cohn alleged Mrs. Cohn had suffered a stroke in 1963 as a result of her use of a product manufactured by petitioner G.D. Searle & Co. ("Searle"). App. 3A.

Searle is a Delaware corporation, with its principal place of business in Skokie, Illinois, that is engaged in the manufacture and sale of pharmaceutical products to hospitals, clinics, and wholesale outlets. Prior to December, 1960, Searle had a distribution center in New Jersey and had been required to obtain a certificate to "transact business" in the State and thereby assume the "same duties" as domestic New Jersey corporations. *See* N.J.S.A. 14A:13-2, 13-4. Searle was thus required to designate a registered agent to accept service of process in any and all cases in New Jersey courts. *Id.* In December, 1960, Searle closed its New Jersey distribution center and cancelled its certificate to transact business in New Jersey. Since that date, Searle has been engaged exclusively in interstate commerce in New Jersey, but has been amenable to long-arm jurisdiction in New Jersey in personal injury actions that arose from use of its products in the State. *See* Appendix filed with the Third Circuit ("R.") 110-113.

Respondents "discovered" their cause of action against Searle in 1969 or 1970. App. 4A n.3. In August, 1970, respondents thus wrote letters to the New Jersey Secretary of State (and Searle's former registered agent (CIT Corporation)), asserted that they intended "to file suit shortly against [Searle]," and inquired if Searle had a registered agent in the State upon whom service could be made. R. 157-159. They learned that Searle did not. These letters discharged respondents' obligations under the New Jersey rules to make "proper efforts to effect service in New Jersey" before resorting to the use of long-arm jurisdiction.[7]

Respondents subsequently decided not to file suit in 1970. Their stated reasons are that they had serious doubts about the strength of the evidence of causation and questioned whether a suit could be worth the mental stress on Mrs. Cohn. App. 48A. However, four years later — and at least two years after the statute of limitations ran out — plaintiffs decided to file this action.

Both the District Court and the Third Circuit have recognized that respondents were not relying on the tolling statute when they failed to file this action within two years of their 1970 inquiries.[8] Thus, when respondents finally filed this suit in

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[7] *Velmohos* v. *Maren Engineering Corp., supra,* 416 A.2d at 381.

[8] App. 48A (District Court). In the Third Circuit's initial opinion of January 6, 1986 (App. 17A-33A), in contrast, the Third Circuit credited respondents' self-serving assertions (made for the first time in 1983) that they had in fact relied on the applicability of the Tolling Statute in failing to file suit in 1970. Searle then petitioned for rehearing. It argued that the record showed that respondents had not in fact relied on the tolling statute because they did not check every two years to see if Searle had commenced the running of the limitations period by re-registering to do business in the interim — as a plaintiff that was relying on the tolling statute would have had to do. The Third Circuit then amended its opinion to delete any references to respondents' actual reliance and to make it explicit that its holding

(Footnote continued on following page)

January, 1974, they sought to avoid the defense of the statute of limitations solely by contending that they had not discovered their cause of action until late 1973 and that Mrs. Cohn's mental condition precluded the institution of this suit in a timely fashion. The District Court rejected both contentions and held that the statute of limitations requires dismissal of this suit — unless the Tolling Statute can validly be applied to preserve a cause of action against out-of-state corporations like Searle. R. 472-490.

New Jersey Supreme Court Decisions On Remand. Following this Court's earlier decision on this question, the New Jersey Supreme Court resolved the "ambiguity" in the state law by holding that "a foreign corporation must obtain a certificate to do business in this state . . . in order to achieve 'representation' in the context of [the Tolling Statute]." *Coons* v. *American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921, 922 (1983) ("*Coons I*"). The New Jersey Supreme Court held that it necessarily followed that the Tolling Statute unconstitutionally discriminates against interstate commerce in violation of the Commerce Clause under the rule of *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914), and *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974). This ruling was held to apply to all pending

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would permit the maintenance of suits that would not have been timely filed if there had been no tolling statute. *See* App. 35A-37A.

Indeed, there is *no* reported decision involving this issue in which a plaintiff has demonstrated actual reliance on the tolling statute. In *Love* v. *Johns-Manville Canada, Inc.* 609 F. Supp. 1457, 1467 (D.N.J. 1985), the court found no actual reliance and in a second case the affidavit explaining why the suit was untimely filed indicates no reliance on the tolling statute. Affidavit of Plaintiff's Counsel in Opposition to Motion For Summary Judgment, April 19, 1979, *Hopkins* v. *Kelsey-Hayes Inc.*, No. 78-1646, (D.N.J.).

cases that had not reached final judgment. 94 N.J. at 318-19, 463 A.2d at 927.[9]

However, the New Jersey Supreme Court thereafter reconsidered this latter holding and held, over three dissents, that "*Coons I* is to be applied prospectively only, from the date of that decision, August 3, 1983." *Coons* v. *American Honda Motor Co.*, 96 N.J. 419, 476 A.2d 763, 765 (1984), *cert. denied*, 105 S. Ct. 808 (1985) ("*Coons II*"). The effect of this holding is that the tolling statute would deprive out-of-state corporations of the statute of limitations defense in *all* pending cases (including *Coons* itself) and also in all personal injury cases filed over the ensuing two years and in all property actions filed over the ensuing six years. App. 45A.

District Court's Decision. On the remand of this case, Searle renewed its motion for summary judgment and urged that it was entitled, as a matter of federal law, to obtain the benefit of the statute of limitations defense in this case. Notwithstanding the New Jersey Supreme Court decision in *Coons II*, the District Court agreed and rejected respondents' argument that the criteria of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), could require or permit the substantive constitutional holding to be applied purely prospectively.

The District Court held that the Tolling Statute was a stark example of impermissible discrimination against interstate commerce. App. 44A. Because the application of the Tolling Statute would represent "an immediate burden on commerce of an extensive and pervasive nature," the District Court stated that it was "not at all sure" that it was appropriate even to consider the *Chevron* "balancing test." App. 46A. In any event,

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[9] Although there were three dissenters in *Coons I*, even they agreed that the statute should not be applied to suits arising before the date of the Court's decision. 94 N.J. at 326, 463 A.2d at 931. They argued, instead, that the Tolling Statute should be given a "saving" construction prospectively.

the District Court held that the three *Chevron* criteria prohibit the imposition of a discriminatory burden in this case.

First, the District Court held that the holding that the Tolling Statute could not validly be applied to Searle was not a "clear break" with a uniform body of prior law and did not meet the first *Chevron* criterion. App. 46A-47A. The District Court reasoned that it has been "well established as a matter of federal law that a state may not discriminate against a foreign corporation engaged in interstate commerce merely because it has failed to qualify to do business in that state." App. 47A. Indeed, because there had been "confusion and controversy" and contradictory decisions in New Jersey and elsewhere over the applicability of the Tolling Statute to out-of-state corporations like Searle for two decades, there was no prior law on which respondents could have reasonably relied in failing to file suit. App. 47A-51A.

Second, the District Court held that the purposes of the federal constitutional rule require that it be applied to pending cases. It reasoned that the Commerce Clause is designed to prevent States from imposing discriminatory burdens on interstate commerce. "Retroactive application of *Coons I* furthers that objective; prospective application defeats it." App. 47A.

Finally, the District Court held that the equities of this case could not permit a different result. It noted that respondents could have commenced their action in a timely fashion, but decided not to do so for reasons unrelated to the tolling statute. App. 47A-51A.

Court of Appeals' Decision. On appeal, the Third Circuit accepted the District Court's conclusion about the state of law at the time that this suit was filed. App. 11A. However, the Third Circuit reversed on the basis of its very different understanding of the applicable retroactivity principles.

First, in the Third Circuit's view, the holding that the tolling statute could not be applied to Searle established a "new

principle of law." Although the Third Circuit acknowledged that "the applicability of the tolling statute to foreign corporations subject to long-arm service was in doubt until well *after* plaintiffs filed their complaint" (App. 11A) (emphasis added), it thought it was pertinent that the tolling statute had been applied to *other* defendants for over a century with no hint of Commerce Clause objections. App. 9A. It also acknowledged that the invalidation of the Tolling Statute was an application of "well-settled [Commerce Clause] precedents." *Id.* However, the Third Circuit held that the decision invalidating the tolling statute was an "extension" of the earlier precedents because, there, the discrimination had taken the form of a denial of the right to file suits in state court as a plaintiff, rather than the denial of a dispositive defense. App. 9A-10A. The Third Circuit stated that Commerce Clause doctrine is so "flexible" that plaintiffs could "reasonably have believed" that the Tolling Statute would be upheld. *Id.*

Second, the Third Circuit held that the nonretroactive invalidation of the Tolling Statute would serve the purposes of the Commerce Clause. It reasoned that any "inhibiting effect" on corporations doing business in New Jersey "vanishes once the statute is invalidated" prospectively. App. 10A. While the Court acknowledged that "prospective invalidation will permit maintenance of some suits that would not have been timely filed absent the tolling statute" over the next six years, the Third Circuit held that this "slight marginal burden" does no "violence to the Commerce Clause." App. 11A.

Finally, the Third Circuit thought that equitable considerations pointed to nonretroactive application. Although the Court, again, acknowledged that there was *no* law upon which respondents could have safely relied in failing to file suit within two years, it thought it significant that respondents' "apparent interpretation" of the statute was "ultimately vindicated" in *Velmohos.* App. 11A. The Third Circuit did not refer to the fact that the decision in *Velmohos* was itself vacated by this Court. 455 U.S. 985 (1982).

REASONS FOR GRANTING THE WRIT

The Third Circuit's holding that an unconstitutional tolling statute can be applied to pending cases squarely conflicts with the Second Circuit's holding on this identical issue in *Industrial Consultants, Inc.* v. *H.S. Equities, Inc.*, 646 F.2d 746, 749 (2d Cir.), *cert. denied*, 454 U.S. 838 (1981). More fundamentally, the Third Circuit's holding conflicts with the retroactivity principles that the First, Fourth, Fifth, Seventh, and District of Columbia Circuits have applied to determine the retroactivity of Commerce Clause and other civil federal constitutional holdings.

The Third Circuit's decision is vivid testimony to the confusion and vast amounts of unnecessary litigation that retroactivity disputes generate in civil cases in which there is no "avulsive change" in the law (*Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968)), and in which courts should have no occasion, in Judge Henry Friendly's words, "to engage in the balancing process" of the Third Circuit. *Kremer* v. *Chemical Construction Corp.*, 623 F.2d 786, 789 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982). Indeed, it is the case today that virtually every civil decision of this Court spawns a second "round of litigation" over the decision's "retroactivity" — no matter how "interstitial" the decision and no matter how clear it is that a holding of nonretroactivity will produce unconstitutional discrimination.[10]

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[10] *See, e.g., Gross* v. *Harris*, 664 F.2d 667 (8th Cir. 1981) (retroactivity of *Trimble* v. *Gordon*, 430 U.S. 762 (1977)); *Jiminez* v. *Weinberger*, 523 F.2d 689 (7th Cir. 1975) (retroactivity of *Jiminez* v. *Weinberger*, 417 U.S. 628 (1974)); *EEOC* v. *Puget Sound Log Scaling and Grading Bureau*, 752 F.2d 1389 (9th Cir. 1985) (retroactivity of *Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983)); *Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979) (retroactivity of *United States* v. *United States District Court (Keith)*, 407 U.S. 297 (1972)); *Cash* v. *Califano*, 621 F.2d 626 (4th Cir. 1980) (retroactivity of *Califano* v. *Goldfarb*, 430 U.S. 199

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1. The starting point in any discussion of retroactivity is that this Court's decisions establish a strong presumption that civil constitutional and other holdings are to be applied to all pending cases. *Robinson* v. *Neal*, 409 U.S. 505, 507-08 (1973); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801). Because a requirement of retroactivity is a guarantee of principled decisionmaking, this Court's decisions have sought to assure that exceptions to the general rule are narrowly confined to situations in which a new judicial decision causes "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one" on which parties could have justifiably relied; there must be an "avulsive change which caused the current of the law thereafter to flow between new banks." *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. at 498-99. But even

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(1977)); *Unger* v. *Consolidated Foods Corp.*, 693 F.2d 703 (7th Cir. 1982) (retroactivity of *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982)); *Acoff* v. *Abston*, 762 F.2d 1543 (11th Cir. 1985) (retroactivity of *Tennessee* v. *Garner*, 105 S. Ct. 1694 (1985)); *In re S/S Helena*, 529 F.2d 744 (5th Cir. 1976) (retroactivity of *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970)); *Holzsager* v. *Valley Hospital*, 646 F.2d 792 (2d Cir. 1981) (retroactivity of *Rush* v. *Savchuk*, 444 U.S. 320 (1980)); *Simpson* v. *Director, Office of Workers' Compensation Programs, United States Department of Labor*, 681 F.2d 81 (1st Cir. 1982) (retroactivity of *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962)); *Rudolph* v. *Wagner Electric Corp.*, 586 F.2d 90 (8th Cir. 1978) (retroactivity of *International Union of Electrical Workers, Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976)); *Fernandez* v. *Chardon*, 681 F.2d 42 (1st Cir. 1982) (retroactivity of *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980)); *Antoine* v. *United States Postal Service*, 781 F.2d 433 (5th Cir. 1986) (retroactivity of *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147 (1984)); *Smith* v. *Pittsburgh*, 764 F.2d 188 (3d. Cir. 1985) (retroactivity of *Wilson* v. *Garcia*, 105 S. Ct. 1938 (1985)); *Zemonick* v. *Consolidation Coal Co.*, 762 F.2d 381 (4th Cir. 1985) (retroactivity of *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983)).

when this threshold requirement of a "clear break" with past decisions has been met, holdings of nonretroactivity can occur only if the purposes of the new rule so permit.

Thus, rulings on retroactivity focus on three criteria: (1) whether the decision establishes such a "new principle of law," (2) whether the purposes of the constitutional rule would be furthered or retarded by retroactive application, and (3) whether "inequity" is imposed by retroactive application. *Chevron Oil Co.* v. *Huson,* 404 U.S. at 106-07; *cf., Johnson* v. *New Jersey,* 384 U.S. 719, 728 (1966). As Judge Haynsworth observed in an opinion for the Fourth Circuit, the first and third criteria are closely interrelated, for each is designed to identify cases when parties have reasonably and substantially "relied upon prior legal interpretations." *Cash* v. *Califano,* 621 F.2d at 628-30.

2. **Reliance.** The decisions of this Court and other courts of appeals squarely reject the basis of the Third Circuit's holding in this case. They establish that a substantive constitutional holding can not be deemed to be a "new principle of law" when the holding applied "well settled precedents" that prohibit discrimination against unregistered corporations, when there had previously been conflicting lower court decisions, and when "the applicability of the tolling statute . . . was in doubt until well after plaintiffs filed their complaint." App. 9A, 11A. Here, there was simply no prior rule on which respondents could have justifiably relied.

These decisions establish that the strong presumption of retroactivity cannot be rebutted by showing that, prior to the decision of invalidation, a plaintiff could have hoped or even "reasonably believed" that the "well-settled precedents" would be held distinguishable and that conflicting prior decisions would be resolved in its favor. *Compare* App. 9A-10A. If that were the law, *every* civil decision of this Court would lead to litigation over its applicability to other pending cases. As Judge Coffin stated in an opinion for the First Circuit:

> "Most court-made law is interstitial, constrained by previously enacted principles of positive constitutional and statutory law, and merely clarifies points that were previously open to debate. . . . Almost every plenary decision of the Supreme Court resolves an issue of first impression, narrowly defined, and hardly any is *clearly* foreshadowed. Analysis of *Chevron Oil's* first factor requires more. . . . The question is whether preexisting doctrine was so clear as to be likely to induce extensive commitments based on a particular different understanding of the law. . . ."[11]

Similarly, Judge Friendly stated for the Second Circuit that courts cannot adopt a "broader reading of *Chevron*" in which decisions that are not "an avulsive change" in the law could be applied nonretroactively. Otherwise, it would "require courts to engage in the balancing process demanded by the second and third factors whenever a recognized legal principle . . . had been applied — or not applied — to a situation not precisely covered by previous decisions." *Kremer* v. *Chemical Construction Corp.*, 623 F.2d at 789.

Thus, the Seventh Circuit has also rejected the Third Circuit's position and held that even "surpris[ing]" and "startling" decisions must be applied to pending cases if they apply settled doctrine.[12] Similarly, the Fourth Circuit and District of Columbia Circuits hold that a litigant's "hope" that past decisions will be distinguished and a trend "halt[ed]" can never convert an adverse holding into a new principle of law.[13] As the Fifth Circuit has held, there must be "clear past

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[11] *Simpson* v. *Director, Office of Workers' Compensation Programs, United States Department of Labor*, 681 F.2d at 85, 87 (emphasis in original).

[12] *MCI Telecommunications, Inc.* v. *AT&T*, 708 F.2d 1081, 1136 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

[13] *Cash* v. *Califano, supra*, 621 F.2d at 630; *accord Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981).

precedent" on which a plaintiff could have reasonably relied;[14] here, there was indisputably none. This Court has held that when, as here, there previously had been conflicting lower court decisions, a holding of nonretroactivity is impossible:

> "And any argument by respondent against retroactive application to him of our present decision, even if he could establish reliance upon the earlier *Friedman* decision, would be unavailing since the existence of conflicting cases from other courts of appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable." *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984).

Indeed, the Second Circuit thus held that the presence of prior conflicting decisions forecloses a holding of nonretroactivity in a civil case even when the vast majority of the prior authorities had supported respondents. *See Kremer* v. *Chemical Construction Corp.*, 623 F.2d at 790. Here, the opposite was the case. See p.5, *supra*.

This is an ideal case to resolve these conflicts and put an end to needless litigation of retroactivity in civil cases. Here, the District Court and the Third Circuit agreed on the prior state of the law. The District Court held that a holding of nonretroactivity is an impossibility because neither this Court's decision in this case in 1982 nor the decisions on remand were an "avulsive change in the law."[15] The Third Circuit reversed

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[14] *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857, 862 (5th Cir. 1983).

[15] The District Court concluded (App. 46A-47A) that there could be no "clear break" and "new principle of law" under *Chevron* unless (1) a prior decision of the Court had been overruled, (2) a practice implicitly sanctioned by the Court had been rejected, or (3) a uniform body of lower court holdings had been rejected. The District Court thus applied the criteria that this Court developed in *United States* v. *Johnson*, 457 U.S. 537, 551-53 (1982) to determine whether new decisions involving the Fourth Amendment's exclusionary rule

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only because it sanctioned the ad hoc "balancing test" that this Court and other courts reject. Indeed, the Third Circuit held a decision nonretroactive when it had not only been impossible for a plaintiff to have reasonably relied on the applicability of the Tolling Statute, but when the absence of actual reliance has been demonstrated in each of the pending cases. See p.7, n.8, *supra*.

3. **Purposes of Rule.** The decisions of this Court and courts of appeals similarly reject the Third Circuit's holding that the purposes of the Commerce Clause are furthered by the holding that the Tolling Statute can be applied to prevent dismissal of all pending time-barred cases and also time-barred cases filed as late as August 3, 1989.

The tolling statute imposes "added costs" on out-of-state companies that their domestic New Jersey competitors do not have to bear: the costs of defending time-barred suits and possibly paying adverse judgments. *See Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 42-44 (1980). It having been established that there is no state interest sufficient to justify this discrimination, the Commerce Clause requires that these "added costs" not be imposed and that "equality of treatment" be observed hereafter. The purpose of the Commerce Clause can no more permit courts to impose discriminatory costs by enforcing the unconstitutional tolling statute in pending and future cases than it can allow them to order out-of-state corporations to continue to pay discriminatory taxes. *See Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318

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applied to pending cases on direct review. *Compare Solem* v. *Stumes*, 465 U.S. 638 (1984) (applying different principles to determine retroactivity of 5th Amendment prophylactic rule to cases on collateral review). It is, *a fortiori*, that the *Johnson* principles apply to civil constitutional holdings when, as here, they involve personal constitutional rights and not just remedial rules designed to deter future violations.

(1977); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931). This principle has acute force here because the Third Circuit acknowledges that it is allowing the maintenance of suits against out-of-state corporations that would not have been timely filed even if there had never been a tolling statute. App. 11A.[16]

Thus, when this Court has held that state statutes violate the Commerce Clause, their future enforcement has uniformly been enjoined forthwith, in pending cases and otherwise — without regard to the *Chevron* criteria. *See, e.g., Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 53 (1980). The Court reached the same result late last term in a case involving similar rights to equal treatment, again without discussing *Chevron* criteria. *Reed* v. *Campbell*, 54 U.S.L.W. 4646 (June 11, 1986) (applying *Trimble* v. *Gordon*, 430 U.S. 762 (1977), to all claims filed in cases pending on date of decision). *Compare* App. 12A-13A.

The Third Circuit's contrary holding also squarely conflicts with the Second Circuit's holdings in this area. When state statutes unconstitutionally discriminate against interstate commerce, the Second Circuit holds that it "cannot allow their enforcement to continue for even sixty days," *Loretto Winery Ltd.* v. *Duffy*, 761 F.2d 140, 141 (2d Cir. 1985), much less for the two to six years sanctioned by the courts here. For the same reasons, the Second Circuit found it so obvious as to require no discussion that an unconstitutional Tolling Statute cannot be applied to a pending case, without regard to the *Chevron*

[16] To the extent the Third Circuit held that there are other cases in which it was the existence of the tolling statute that caused a delay in filing suit (App. 10A-11A), its holding rests on the court's belief (shown to be erroneous above, pp. 14-17, *supra*) that justifiable reliance on the tolling statute has been possible.

criteria. *Industrial Consultants, Inc.* v. *H.S. Equities, Inc.*, 646 F.2d at 749.[17]

But the most extraordinary feature of the Third Circuit decision is its refusal to apply the constitutional holding to this precise case. *See* App. 13A-15A. It is undisputed that Searle was the sole champion of the Commerce Clause claim for most of the past 12 years and has litigated this issue in this case in the District Court twice, in the Third Circuit three times, and in this Court twice. No litigant will have the incentive to undertake the burden of such a long and expensive fight unless the litigant is assured that it will receive the benefit of a favorable ruling in that case. *Cf. Stovall* v. *Denno*, 388 U.S. 293, 301 (1967). The Third Circuit's holding on this point will subvert the enforcement of the Commerce Clause.

4. Finally, a decision of these questions has importance beyond the legal principles involved. There are hundreds of pending cases in state or federal courts in New Jersey in which the statute of limitations could bar a suit against an out-of-state corporation, absent the interposition of the Tolling Statute. In

[17]It is equally plain that the establishment of a principle that "added costs" can be constitutionally imposed on out-of-state companies in the hundreds of cases that are pending or impending at the time the statute is invalidated *will* have the very "inhibitory effect" on free trade that the Commerce Clause sought to end. *Compare* App. 10A. The Commerce Clause cannot tolerate giving each State free "bites at the protectionist 'apple'." These considerations have special force here because the New Jersey legislature has responded to the decision invalidating the tolling statute by enacting an "amendment" to the statute that suffers from the same defect as the original. It continues to deny the statute of limitations defense to out-of-state corporations subject to long-arm jurisdiction unless they appoint an agent in the State to accept service of process and thereby waive their constitutional rights to defend suits in New Jersey courts *only* when the minimum contacts test of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) are satisfied. *See* N.J.S.A. 2A:14-22 (Supp. 1986).

the Third Circuit, amicus Brinco Mining Company identified 60 such cases in one consolidated proceeding in federal district court alone.[18] Further, there are indeterminant numbers of future cases that could be brought in the two to six year period in which such actions will be timely under the Third Circuit's holding.

[18] Statement of Interest of *Amicus Curiae* Brinco Mining, Ltd., July 1, 1985 at 2.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

AMENDED
COURT OF APPEALS OPINION
784 F.2d 460

Susan COHN and Walter Cohn, her husband, Appellants,

v.

G.D. SEARLE & CO., Appellee,

Irwin I. Kimmelman, Esq., Attorney General of New Jersey, Intervenor.

No. 85-5048.

United States Court of Appeals, Third Circuit.

Argued Nov. 5, 1985.

Decided Jan. 7, 1986.

As Modified on Denial of Rehearing
March 12, 1986.

Before SEITZ, WEIS and ROSENN, Circuit Judges.

OPINION OF THE COURT

SEITZ, Circuit Judge.

Plaintiffs Susan Cohn and Walter R. Cohn, husband and wife, appeal from the final summary judgment of the district court dismissing their complaint as untimely. Plaintiffs are residents of New Jersey; defendant G.D. Searle & Co. (Searle) is a Delaware corporation whose principal place of business is in Illinois. The district court's jurisdiction over this case was grounded in diversity, 28 U.S.C. § 1332 (1982). We have appellate jurisdiction under 28 U.S.C. § 1291 (1982).

I.

The serpentine course of this litigation may be adequately charted from the five published opinions it has generated,[1] and there is no need to do more here than briefly note its highlights.

Plaintiffs brought suit in 1974 in the Superior Court of New Jersey. The complaint alleged that Susan Cohn suffered a stroke in 1963 that was caused by her use of the oral contraceptive Enovid, manufactured by Searle. Liability was premised on various state-law tort theories.

After removing the case to federal court, Searle moved for summary judgment on the ground that the suit was untimely under New Jersey's two-year statute of limitations for tort actions, N.J.Stat.Ann. 2A:14-2 (West 1969). Plaintiffs argued in response that the action was timely because N.J.Stat.Ann. 2A:14-22 (West 1969) (the tolling statute), tolled the statute of limitations.[2] The tolling statute provides that the statute of

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[1] *Cohn v. G.D. Searle & Co.*, 447 F.Supp. 903 (D.N.J.1978), *rev'd sub nom. Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801 (3d Cir.1980), *vacated and remanded*, 455 U.S. 404, 102 S.Ct. 1137, 71 L.Ed.2d 250 (1982), *remanded sub nom. Hopkins v. Kelsey-Hayes, Inc.*, 677 F.2d 301 (3d Cir.1982), *on remand*, 598 F.Supp. 965 (D.N.J.1984).

[2] The tolling statute reads in relevant part:

> "If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8 . . . is not a resident of this state when such cause of action accrues. . . . or if any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such a cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person . . . is not residing within this state or such corporation . . . is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be brought commenced by the section.

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limitations is tolled in any action against a foreign corporation not "represented" in New Jersey by an agent for service of process, for as long as the defendant remains unrepresented. Plaintiffs argued—and all parties concede here—that Searle was unrepresented in New Jersey at all relevant times.

Defendant responded, *inter alia,* by arguing that the tolling statute violated the Equal Protection and Due Process clauses of the United States Constitution. The district court accepted Searle's equal protection argument and dismissed the complaint as time-barred.[3]

This court reversed on appeal, holding that the statute violated neither equal protection nor due process.[4] Although Searle's brief before this court also attacked the tolling statute on Commerce Clause grounds, our opinion did not address that issue.

The Supreme Court, on certiorari, affirmed this court's equal protection and due process holdings, but remanded for

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> The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by such section, exclusive of such time or times of nonresidence or nonrepresentation."

[3] In a separate, unreported opinion, the district court found that plaintiffs became aware of the possible link between Enovid and Susan Cohn's stroke no later than 1970. Thus, under New Jersey's discovery rule, the cause of action accrued at that time, and the statute of limitations ran out two years later. *See Lopez v. Swyer,* 62 N.J. 267, 300 A.2d 563 (1973); *Goodman v. Mead Johnson & Co.,* 534 F.2d 566, 570-71 (3d Cir.1976), *cert. denied,* 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977).

[4] We affirmed the district court's statutory holding that Searle was "unrepresented" in New Jersey between 1963 and 1974, and was thus subject to the tolling statute. Following *Velmohos v. Maren Engineering Corp.,* 83 N.J. 282, 416 A.2d 372 (1980), which was decided while the Cohns' appeal was pending, we held further that the tolling statute applied although Searle was at all times subject to long-arm personal jurisdiction.

further consideration of Searle's Commerce Clause claims. The Court declined to reach that issue, first, because it had not been addressed here or in the district court, and second, because of a perceived ambiguity as to the manner in which a foreign corporation could become "represented" within the meaning of the tolling statute. We in turn remanded to the district court to consider those issues.

Following our remand, but before the district court could issue its decision, the Supreme Court of New Jersey decided *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983) (*Coons I*). In that case, whose operative facts were similar in relevant respects to those here, the court resolved the ambiguity in the state law perceived by the Supreme Court by holding that a corporation could only be represented in the state by obtaining a certificate of authority to do business there. *See* N.J.Stat.Ann. 14A:13-4 (1969). As noted by the court, a corporation thus registered is subject, *inter alia*, to personal jurisdiction in any lawsuit commenced in New Jersey. The New Jersey court went on to hold, however, that the tolling statute, thus interpreted, was a "forced-licensure provision" which violated the Commerce Clause.

Subsequently, on rehearing, the court held that its invalidation of the tolling statute would not be accorded retroactive effect[5]; thus, "the statute of limitations as to foreign,

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[5] To avoid terminological confusion, the following definitions are in order. "Retroactive" describes judgments applicable in all cases, regardless of when the cause of action arose or the case was litigated. "Nonretroactive" judgments are those that apply the "new" law to the parties before the court, but the "old" law to the parties to whom some critical event (e.g., the accrual of a cause of action) occurred before the date of the decision. "Prospective" judgments are equivalent to nonretroactive ones, except that the old law is applied even to the parties before the court. *See Marino v. Bowers*, 657 F.2d 1363, 1375 n. 4 (3d Cir.1981) (Weis, J., dissenting). *See generally* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va.L.Rev. 1557 (1975); R. Aldisert, *The Judicial Process* 877-938 (1976).

unrepresented corporations commences to run as of" August 3, 1983, the date of the *Coons I* decision. *Coons v. American Honda Motor Co.*, 96 N.J. 419, 476 A.2d 763 (1984) (*Coons II*). It held further that even the litigants in the case before it would continue to be governed by the tolling statute. The court stated explicitly that the nonretroactivity of *Coons I* was a matter of state law.

After the New Jersey Supreme Court handed down its decision in *Coons II*, Searle renewed its summary judgment motion in the district court to dismiss the complaint as untimely, again arguing that the tolling statute violated the Commerce Clause. Plaintiffs apparently did not contend, at least in their briefs, that the tolling statute was consistent with the Commerce Clause, but argued instead—as they do here—that the holding in *Coons II* that the statute was only invalid prospectively was binding on the federal district court as an interpretation of state law. Alternatively, they argued that federal retroactivity principles dictated the same result reached in *Coons II*. The district court granted Searle's motion and dismissed the complaint. It held, first, that the tolling statute violated the Commerce Clause. Second, it rejected plaintiffs' contention that it was bound by *Coons II* to apply its Commerce Clause holding nonretroactively, and, applying federal retroactivity principles, held that retroactive application was proper. This appeal followed.

II.

[1] Plaintiffs reiterate their contention that under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), we are obliged to follow the New Jersey Supreme Court in applying its *Coons I* holding prospectively. This argument gravely misconceives the *Erie* doctrine. The basis of our jurisdiction here is diversity, but it does not follow that all issues in this case are to be decided under state law. Rather,

although we are required to defer to the state's highest court as the ultimate arbiter of the meaning of state law, that law is only applicable "where the Constitution or treaties of the United States or Acts of Congress [do not] otherwise require or provide." 28 U.S.C. § 1652 (1982) (the Rules of Decision Act). *See Donegal Steel Foundry Co. v. Accurate Prods. Co.*, 516 F.2d 583, 587 n. 6 (3d Cir.1975); *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 540-41 n. 1 (2d Cir. 1956). Where a state statute is held to violate the federal Constitution, the retroactivity *vel non* of that holding is similarly a matter of federal law which we must determine independently. *Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 826, 17 L.Ed.2d 705 (1967). *Cf. Pierzga v. Ford Motor Co., Inc.*, 778 F.2d 149 at 151 (3d Cir.1985) (following state court with respect to retroactive application of *state law* holding); *Ettinger v. Central Penn National Bank*, 634 F.2d 120, 124 (3d Cir. 1980) (same).

III.

[2] We have not been asked to consider the correctness of the district court's holding that the tolling statute violates the Commerce Clause, and consequently we do not reach that question.[6] Instead, we will assume without deciding that it was answered correctly by the district court. Thus, the only issue before us is whether the district court correctly resolved the

[6] Appellant's initial brief did not challenge the district court's Commerce Clause holding in either its statement of issues or its argument. Fed.R.App.P. 28(a) requires appellants to include in their initial brief "[a] statement of the issues presented for review," and it is well settled that courts of appeal will not consider issues not raised in the initial brief. *See* 9 J. Moore, *Moore's Federal Practice* ¶ 228.02[2.-1]. While this rule has been relaxed on occasion, *e.g.*, *Consumers Union of U.S., Inc. v. Federal Power Comm'n*, 510 F.2d 656, 662 (D.C.Cir. 1974), we see no reason to do so here, especially in light of our ultimate disposition of the case.

socondary matter of retroactivity. Our standard of review is plenary.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the Court stated a three-factor test for determining whether a new decision is to be applied retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application would further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07, 92 S.Ct. at 355-56 (citations omitted). *Chevron's* approach to the question of retroactivity is premised on "our recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." *Lemon v. Kurtzman*, 411 U.S. 192, 199, 93 S.Ct. 1463, 1468-69, 36 L.Ed.2d 151 (1973). Under the first prong of the *Chevron* test, therefore, we look to the state of the law prior to the decision sought to be applied retroactively to determine whether that decision had the potential to upset reasonable reliance upon prior law. *Marino v. Bowers*, 657 F.2d 1363, 1367 (3d Cir.1981) (in banc). The question here, then, is whether the Cohn's claimed reliance on the tolling statute was reasonable.[7]

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[7] The parties have argued at length about whether *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), heralds a new approach to the first *Chevron* factor. In *Johnson*, a

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As noted in *Coons I*, 96 N.J. at 431-32, 476 A.2d at 771, the tolling statute in its present form dates to 1949, and "its origins [are] traceable to 1820." Of course, the antiquity of a statute is no guarantee of its constitutionality. But the tolling statute had previously been upheld against constitutional attack, albeit on equal protection grounds, in *Lemke v. Bailey*, 41 N.J. 295, 196 A.2d 523 (1963), and no reported decision had referred to possible Commerce Clause difficulties. Indeed, we are unaware of any reported decision before this one in which a Commerce Clause objection was raised with respect to any similar statute, although numerous such statutes exist. *See* Annot., 55 A.L.R.3d 1158.

Nor were the Commerce Clause principles involved so clear as to make the invalidity of the tolling statute a foregone conclusion. Searle stresses the well-settled precedents on which the *Coons I* court, and the district court here, relied. *See Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 95 S.Ct. 260, 42 L.Ed.2d 195 (1974); *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921); *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 35 S.Ct. 57, 59 L.Ed. 193 (1914). However, it seems plain that *Coons I* was an extension of the holdings in those cases. The statutes in question in *Allenberg Cotton, Sioux Remedy*, and *Dahnke-Walker* entirely closed the

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Fourth Amendment case, the Court referred to this factor as requiring the law-changing decision to be a "clear break with the past." 457 U.S. at 549, 102 S.Ct. at 2587 (quoting *Desist v. United States*, 394 U.S. 244, 248, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248 (1969)); *id.* at 550 n. 12, 102 S.Ct. at 2587 n. 12. We do not read this language as altering the *Chevron* formulation. The *Johnson* Court expressly differentiated criminal and civil retroactivity, stating that "all questions of civil retroactivity continue to be governed by the standard enunciated in" *Chevron*, 457 U.S. at 563, 102 S.Ct. at 2594. Moreover, the Court did not explicate the "clear break" principle in the civil context except to quote from *Chevron*. Finally, the Court recently stressed the narrowness of the *Johnson* approach in *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 1341 n. 3, 79 L.Ed.2d 579 (1984).

courts of the state to unregistered foreign corporations; by contrast, the tolling statute affects only the statute of limitations in actions against such corporations. And, given the highly flexible nature of doctrine in this area, *see, e.g.*, L. Tribe, *American Constitutional Law* 342-44 (1978), plaintiffs could reasonably have believed that the New Jersey tolling statute did not offend the Commerce Clause.

We do not suggest that any decision that extends prior case law creates a "new principle of law" within the meaning of *Chevron*. What is crucial here is the presence of a duly-enacted, and therefore presumptively legitimate, statute on which citizens are normally entitled to rely. We cannot say that such reliance is unreasonable where the statute's constitutionality has never been judicially questioned and where the reach of the constitutional principles involved is as uncertain as here. Thus, the first *Chevron* factor points to nonretroactivity.

The second *Chevron* factor requires us to consider whether retroactive invalidation of the statute will "further or retard [the] operation" of the Commerce Clause principles invoked in *Coons I*. The district court reasoned in this regard: "The purpose of the constitutional rule which governs this case is to free interstate commerce from the burdens which might be imposed by the individual states through which that commerce flows. Retroactive application of *Coons I* furthers that objective; prospective application defeats it." 598 F.Supp. at 971.

Assuming arguendo that the district court correctly stated the purpose of the Commerce Clause rule in this case, we think the burden on interstate commerce that it perceived might result from nonretroactive application of that rule is largely illusory. Certainly, any inhibiting effect the statute might have had on foreign corporations and others contemplating doing business in New Jersey vanishes once the statute is invalidated, whether or not that invalidation is retroactive. Moreover, had there been no tolling statute, the probability is that the Cohns and most other plaintiffs similarly situated would have filed suit

within the two-year statutory period. Although it is possible that prospective invalidation will permit maintenance of some suits that would not have been timely filed absent the tolling statute, we do not think that this slight marginal burden, if any, does violence to the Commerce Clause.[8]

Finally, equitable considerations also point to nonretroactive application. As in *Chevron,* "[i]t would . . . produce the most 'substantial inequitable results' . . . to hold that [plaintiff] 'slept on his rights' at a time when he could not have known the time limitation that the law imposed upon him. . . . [N]onretroactive application simply preserves his right to a day in court." 404 U.S. at 108, 92 S.Ct. at 356. Admittedly, this conclusion is tempered somewhat by the fact, relied on by the district court, that the applicability of the tolling statute to foreign corporations subject to long-arm service was in doubt until well after plaintiffs filed their complaint. However, plaintiffs' apparent interpretation of the statute as applying to such defendants had support in the case law, *see Whalen v. Young,* 28 N.J.Super. 543, 101 A.2d 64 (1953) (limitations period tolled against corporate defendant subject to jurisdiction under nonresident motorist statute), *rev'd on other grounds,* 15 N.J. 321, 104 A.2d 678 (1954); *contra Ferraro v. Ferro Trucking Co.,* 72 N.J.Super. 519, 179 A.2d 74 (1962) (same circumstances—no tolling); *cf. Fidelity Deposit Co. v. Abnagle,* 97 N.J.Super. 132, 234 A.2d 511 (1967) (individual defendant, long-arm jurisdiction—tolling); *Lakovic v. New England Paper Tube Co., Inc.,* 127 N.J.Super. 394, 317 A.2d 426 (1974) (criticizing *Ferraro),* and was ultimately vindicated. *Velmohos v. Maren Engineering Corp.,* 83 N.J. 282, 416 A.2d 372 (1980). Under these circumstances, this arguable lack of caution on

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[8] The New Jersey Supreme Court has held that, even where the claim is timely under the tolling statute, "[i]f a plaintiff's delay is inexcusable and has resulted in prejudice to the defendant, the latter may raise the equitable defense of laches to bar the claim." *Velmohos v. Maren Engineering Corp.,* 83 N.J. 282, 292, 416 A.2d 372, 378 n. 10 (1980). Searle is, of course, free to raise this defense on remand.

plaintiffs' part should not obscure the fundamental inequity of retroactively shortening the period of limitations applicable to their action. Accordingly, we conclude that the three *Chevron* factors point to a holding of nonretroactivity.

IV.

Searle argues, however, that the *Chevron* balancing test is inappropriate here. Citing *United States v. U.S. Coin & Currency,* 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971), and *New York v. Cathedral Academy,* 434 U.S. 125, 98 S.Ct. 340, 54 L.Ed.2d 346 (1977), it argues that any holding that the New Jersey tolling statute violates the Commerce Clause must necessarily apply retroactively, regardless of any equitable or other considerations to the contrary.

In *Marino v. Bowers,* 657 F.2d 1363 (3d Cir.1981) (in banc), we rejected a similar argument that "a ruling dealing with fundamental personal rights should never be limited to prospective application." *Id.* at 1365-66. We noted numerous instances in which the Supreme Court as well as this court had given nonretroactive effect to constitutional rulings in civil as well as criminal cases. Id. at 1366; *see also, e.g., Northern Pipeline Const. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982) (applying *Chevron* test to determine that holding invalidating grant of jurisdiction to bankruptcy judges under Article III should apply nonretroactively). Thus, there can be no disputing that the *Chevron* test is generally applicable to issues of retroactivity, at least in civil cases.

Nor do the two cases cited by defendant persuade us to carve out an exception to *Chevron* in this case. *U.S. Coin & Currency* holds merely that where the Constitution is held to immunize certain conduct from criminal punishment, as under the self-incrimination clause of the Fifth Amendment, such a holding necessarily operates retroactively. That principle has no applicability here.

Cathedral Academy is also inapposite. That case arose out of a New York statute (ch. 138) authorizing the use of state funds to reimburse private schools, including sectarian schools, for certain educational services. After a three-judge court held that ch. 138 violated the Establishment Clause and enjoined any further payments under it, the state legislature enacted a second statute (ch. 996) authorizing reimbursement for services performed in reliance on ch. 138 before its invalidation. In *Cathedral Academy,* the Supreme Court held that payments under ch. 996 also violated the Establishment Clause. The Court noted that the statute was enacted in clear violation of the district court's decree, but held that the dispositive fact was that payments under ch. 996, like those under ch. 138, "will of necessity either have the primary effect of aiding religion, . . . or will result in excessive state involvement in religious affairs." 434 U.S. at 133, 98 S.Ct. at 346 (citations omitted).

Whatever *Cathedral Academy* may teach us about retroactivity in the First Amendment context,[9] we are convinced that the decision does not preclude application of the *Chevron* retroactivity test where the retroactivity issue arises under the Commerce Clause. The balancing of state and national interests appropriate under the Commerce Clause, *see, e.g., Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970), contrasts sharply with the strict Establishment Clause analysis undertaken in *Cathedral Academy,* and is consistent with the balancing required by *Chevron.* We therefore conclude that the *Chevron* test is the appropriate one in this case.

V.

Finally, Searle argues that, even if the invalidation of the tolling statute is to be given general nonretroactive effect, we must nevertheless give it the benefit of the tolling statute's

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9. Neither the Supreme Court nor the lower court in *Cathedral Academy* cited *Chevron* or discussed the retroactivity doctrine.

invalidation in order to avoid rendering an advisory opinion and to give it the fruit of its efforts to change the law.

We have previously rejected the view that Article III does not permit a federal court to declare a new rule of law to be applied purely prospectively. *Ettinger v. Central Penn National Bank,* 634 F.2d 120, 122-24 (3d Cir.1980). But considerations of Article III power do not end the matter; the fact that we *may* constitutionally do something does not entail that we ought to do it. As a matter of judicial policy, we recognize that the benefits of a new legal principle should normally go to the litigant but for whom the issue would not have come to the court's attention. It is fundamental to our jurisprudence that change in the law, at least in the courts, comes only through the efforts of individual litigants, motivated not by an academic concern for doctrinal correctness but by simple self-interest. *See Stovall v. Denno,* 388 U.S. 293, 301, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967).

It does not follow, however, that application of the new legal principle to the litigants is appropriate under all circumstances, regardless of any other considerations. In *England v. State Board of Medical Examiners,* 375 U.S. 411, 419, 84 S.Ct. 461, 467, 11 L.Ed.2d 440 (1964), for example, the Court refused to apply its holding in the case to the parties before it when to do so would have irremediably prejudiced the party who had reasonably relied on prior law. By contrast, in *McSparran v. Weist,* 402 F.2d 867 (3d Cir.1968), *cert. denied,* 395 U.S. 903, 89 S.Ct. 1739, 23 L.Ed.2d 217 (1969), in which this court overruled its previous approval of "manufactured" diversity of citizenship as a basis for federal jurisdiction, we applied the new rule to the parties before the court only after finding that dismissing the action on that basis would not result in irremediable harm to the plaintiff who could still institute an action in state court. *Id.* at 876. *See also id.* at 877 (similar analysis to apply to all cases involving causes of action arising before the date of the decision). Dismissal of plaintiffs claim

here would, of course, forever bar it. And permitting the case to go forward will not prejudice Searle's defense on the merits. In addition, we note that affirming the district court's dismissal of the suit on the ground that Searle is entitled to the benefit of its constitutional attack on the statute would have the paradoxical effect of denying plaintiffs the benefit of *their* successful appeal on the issue of retroactivity. In sum, the circumstances of this case do not warrant excepting Searle from the generally applicable rule we announce today.

VI

We hold, therefore, that the district court erred in applying retroactively its holding that the New Jersey tolling statute violated the Commerce Clause. We reiterate that we express no view as to the constitutionality *vel non* of the tolling statute. The judgment of the district court will be vacated and the case remanded for further proceedings consistent with this opinion.

ORIGINAL
COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5048

SUSAN COHN and WALTER COHN,
her husband,

Appellants

v.

G.D. SEARLE & CO.,

Appellee

IRWIN I. KIMMELMAN, ESQ.,
Attorney General of New Jersey,

Intervenor

Appeal from the United States District
Court for the District of New Jersey
(D.C. Civ. No. 74-0450)

Before SEITZ, WEIS, and ROSENN,
Circuit Judges

Argued November 5, 1985
Opinion filed January 7, 1986

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Opinion of the Court

SEITZ, *Circuit Judge.*

Plaintiffs Susan Cohn and Walter R. Cohn, husband and wife, appeal from the final summary judgment of the district court dismissing their complaint as untimely. Plaintiffs are residents of New Jersey; defendant G.D. Searle & Co. (Searle) is a Delaware corporation whose principal place of business is in Illinois. The district court's jurisdiction over this case was grounded in diversity. 28 U.S.C. § 1332 (1982). We have appellate jurisdiction under 28 U.S.C. § 1291 (1982).

I.

The serpentine course of this litigation may be adequately charted from the five published opinions it has generated,[1] and there is no need to do more here than briefly note its highlights.

Plaintiffs brought suit in 1974 in the Superior Court of New Jersey. The complaint alleged that Susan

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1. *Cohn v. G.D. Searle & Co.*, 447 F. Supp. 903 (D.N.J. 1978), *rev'd sub nom. Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801 (3d Cir. 1980), *vacated and remanded*, 455 U.S. 404 (1982), *remanded sub nom. Hopkins v. Kelsey-Hayes, Inc.*, 677 F.2d 301 (3d Cir. 1982), *on remand*, 598 F. Supp. 965 (D.N.J. 1984).

Cohn suffered a stroke in 1963 that was caused by her use of the oral contraceptive Enovid, manufactured by Searle. Liability was premised on various state-law tort theories.

After removing the case to federal court, Searle moved for summary judgment on the ground that the suit was untimely under New Jersey's two-year statute of limitations for tort actions, N.J. Stat. Ann. 2A:14-2 (West 1969). Plaintiffs argued in response that the action was timely because N.J. Stat. Ann. 2A:14-22 (West 1969) (the tolling statute), tolled the statute of limitations.[2] The tolling statute provides that the statute of limitations is tolled in any action against a foreign corporation not "represented" in New Jersey by an agent for service of process, for as long as the defendant remains unrepresented. Plaintiffs argued--and all parties concede here--that Searle was unrepresented in New Jersey at all relevant times.

Defendant responded, *inter alia*, by arguing that the tolling statute violated the Equal Protection and

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2. The tolling statute reads in relevant part:

> "If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8 . . . is not a resident of this state when such cause of action accrues. . . . or if any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such a cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person . . . is not residing within this state or such corporation . . . is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be brought commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by such section, exclusive of such time or times of nonresidence or nonrepresentation."

Due Process clauses of the United States Constitution. The district court accepted Searle's equal protection argument and dismissed the complaint as time-barred.[3]

This court reversed on appeal, holding that the statute violated neither equal protection nor due process.[4] Although Searle's brief before this court also attacked the tolling statute on Commerce Clause grounds, our opinion did not address that issue.

The Supreme Court, on certiorari, affirmed this court's equal protection and due process holdings, but remanded for further consideration of Searle's Commerce Clause claims. The Court declined to reach that issue, first, because it had not been addressed here or in the district court, and second, because of a perceived ambiguity as to the manner in which a foreign corporation could become "represented" within the meaning of the tolling statute. We in turn remanded to the district court to consider those issues.

Following our remand, but before the district court could issue its decision, the Supreme Court of New Jersey decided *Coons v. American Honda Motor Co.*,

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3. In a separate, unreported opinion, the district court found that plaintiffs became aware of the possible link between Enovid and Susan Cohn's stroke no later than 1970. Thus, under New Jersey's discovery rule, the cause of action accrued at that time, and the statute of limitations ran out two years later. *See Lopez v. Swyer*, 62 N.J. 267, 300 A.2d 563 (1973); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 570-71 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

4. We affirmed the district court's statutory holding that Searle was "unrepresented" in New Jersey between 1963 and 1974, and was thus subject to the tolling statute. Following *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), which was decided while the Cohns' appeal was pending, we held further that the tolling statute applied although Searle was at all times subject to long-arm personal jurisdiction.

94 N.J. 307, 463 A.2d 921 (1983) (*Coons I*). In that case, whose operative facts were similar in relevant respects to those here, the court resolved the ambiguity in the state law perceived by the Supreme Court by holding that a corporation could only be represented in the state by obtaining a certificate of authority to do business there. *See* N.J. Stat. Ann. 14A:13-4 (1969). As noted by the court, a corporation thus registered is subject, *inter alia*, to personal jurisdiction in any lawsuit commenced in New Jersey. The New Jersey court went on to hold, however, that the tolling statute, thus interpreted, was a "forced-licensure provision" which violated the Commerce Clause.

Subsequently, on rehearing, the court held that its invalidation of the tolling statute would not be accorded retroactive effect[5]: thus, "the statute of limitations as to foreign, unrepresented corporations commences to run as of" August 3, 1983, the date of the *Coons I* decision. *Coons v. American Honda Motor Co.*, 96 N.J. 419, 476 A.2d 763 (1984) (*Coons II*). It held further that even the litigants in the case before it would continue to be governed by the tolling statute. The court stated explicitly that the nonretroactivity of *Coons I* was a matter of state law.

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5. To avoid terminological confusion, the following definitions are in order. "Retroactive" describes judgments applicable in all cases, regardless of when the cause of action arose or the case was litigated. "Nonretroactive" judgments are those that apply the "new" law to the parties before the court, but the "old" law to parties to whom some critical event (e.g., the accrual of a cause of action) occured before the date of the decision. "Prospective" judgments are equivalent to nonretroactive ones, except that the old law is applied even to the parties before the court. *See Marino v. Bowers*, 657 F.2d 1363, 1375 n.4 (3d Cir. 1981) (Weis, J., dissenting). *See generally* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557 (1975); R. Aldisert, *The Judicial Process* 877-938 (1976).

After the New Jersey Supreme Court handed down its decision in *Coons II*, Searle renewed its summary judgment motion in the district court to dismiss the complaint as untimely, again arguing that the tolling statute violated the Commerce Clause. Plaintiffs apparently did not contend, at least in their briefs, that the tolling statute was consistent with the Commerce Clause, but argued instead--as they do here--that the holding in *Coons II* that the statute was only invalid prospectively was binding on the federal district court as an interpretation of state law. Alternatively, they argued that federal retroactivity principles dictated the same result reached in *Coons II*. The district court granted Searle's motion and dismissed the complaint. It held, first, that the tolling statute violated the Commerce Clause. Second, it rejected plaintiffs' contention that it was bound by *Coons II* to apply its Commerce Clause holding nonretroactively, and, applying federal retroactivity principles, held that retroactive application was proper. This appeal followed.

II.

Plaintiffs reiterate their contention that under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), we are obliged to follow the New Jersey Supreme Court in applying its *Coons I* holding prospectively. This argument gravely misconceives the *Erie* doctrine. The basis of our jurisdiction here is diversity, but it does not follow that all issues in this case are to be decided under state law. Rather, although we are required to defer to the state's highest court as the ultimate arbiter of the meaning of state law, that law is only applicable "where the Constitution or treaties of the United States or Acts of Congress [do not] otherwise require or provide." 28 U.S.C. § 1652 (1982) (the Rules of Decision Act). *See Donegal Steel Foundry Co. v. Accurate Prods. Co.*, 516

F.2d 583, 587 n.6 (3d Cir. 1975); *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 540-41 n.1 (2d Cir. 1956). Where a state statute is held to violate the federal Constitution, the retroactivity *vel non* of that holding is similarly a matter of federal law which we must determine independently. *Chapman v. California*, 386 U.S. 18, 21 (1967). *Cf. Pierzga v. Ford Motor Co., Inc.*, No. 85-5035, slip op. at 7 (3d Cir. Dec. 9, 1985) (following state court with respect to retroactive application of *state law* holding); *Ettinger v. Central Penn National Bank*, 634 F.2d 120, 124 (3d Cir. 1980) (same).

III.

We have not been asked to consider the correctness of the district court's holding that the tolling statute violates the Commerce Clause, and consequently we do not reach that question.[7] Instead, we will assume without deciding that it was answered correctly by the district court. Thus, the only issue before us is whether the district court corectly resolved the secondary matter of retroactivity. Our standard of review is plenary.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court stated a three-factor test for determining whether a new decision is to be applied retroactively:

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7. Appellant's initial brief did not challenge the district court's Commerce Clause holding in either its statement of issues or its argument. Fed. R. App. P. 28(a) requires appellants to include in their initial brief "[a] statement of the issues presented for review," and it is well settled that courts of appeal will not consider issues not raised in the initial brief. *See* 9 J. Moore, *Moore's Federal Practice* ¶ 228.02[2.-1]. While this rule has been relaxed on occasion, *e.g. Consumers Union of U.S., Inc. v. Federal Power Comm'n*, 510 F.2d 656, 662 (D.C. Cir. 1974), we see no reason to do so here, especially in light of our ultimate disposition of the case.

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application would further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted). *Chevron's* approach to the question of retroactivity is premised on "our recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973). Under the first prong of the *Chevron* test, therefore, we look to the state of the law prior to the decision sought to be applied retroactively to determine whether that decision had the potential to upset reasonable reliance upon prior law. *Marino v. Bowers*, 657 F.2d 1363, 1367 (3d Cir. 1981) (in banc). The question here, then, is whether the Cohn's claimed reliance on the tolling statute was reasonable.[8]

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8. The parties have argued at length about whether *United States v. Johnson*, 457 U.S. 537 (1982), heralds a new approach to the first *Chevron* factor. In *Johnson*, a Fourth Amendment case, the Court referred to this factor as requiring the law-changing decision to be a "clear break with the past." 457

As noted in *Coons I*, 94 N.J. at ___, 476 A.2d at 771, the tolling statute in its present form dates to 1949, and "its origins [are] traceable to 1820." Of course, the antiquity of a statute is no guarantee of its constitutionality. But the tolling statute had previously been upheld against constitutional attack, albeit on equal protection grounds, in *Lemke v. Bailey*, 41 N.J. 295, 196 A.2d 523 (1963), and no reported decision had referred to possible Commerce Clause difficulties. Indeed, we are unaware of any reported decision before this one in which a Commerce Clause objection was raised with respect to any similar statute, although numerous such statutes exist. *See* Annot., 55 A.L.R.3d 1158.

Nor were the Commerce Clause principles involved so clear as to make the invalidity of the tolling statute a foregone conclusion. Searle stresses the well-settled precedents on which the *Coons I* court, and the district court here, relied. *See Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974); *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282 (1921); *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914). However, it seems plain that *Coons I* was an extension of the holdings in those cases. The statutes in question in *Allenberg Cotton*, *Sioux Remedy*, and *Dahnke-Walker* entirely closed the

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U.S. at 549 (quoting *Desist v. United States*, 394 U.S. 244, 248 (1969)); *id.* at 550 n.12. We do not read this language as altering the *Chevron* formulation. The *Johnson* Court expressly differentiated criminal and civil retroactivity, stating that "all questions of civil retroactivity continue to be governed by the standard enunciated in" *Chevron*, 457 U.S. at 563. Moreover, the Court did not explicate the "clear break" principle in the civil context except to quote from *Chevron*. Finally, the Court recently stressed the narrowness of the *Johnson* approach in *Solem v. Stumes*, 104 S. Ct. 1338, 1341 n.3 (1984).

courts of the state to unregistered foreign corporations; by contrast, the tolling statute affects only the statute of limitations in actions against such corporations. And, given the highly flexible nature of doctrine in this area, *see, e.g.*, L. Tribe, *American Constitutional Law* 342-44 (1978), plaintiffs could reasonably have believed that the New Jersey tolling statute did not offend the Commerce Clause.

We do not suggest that any decision that extends prior case law creates a "new principle of law" within the meaning of *Chevron*. What is crucial here is the presence of a duly-enacted, and therefore presumptively legitimate, statute on which citizens are normally entitled to rely. We cannot say that such reliance is unreasonable where the statute's constitutionality has never been judicially questioned and where the reach of the constitutional principles involved is as uncertain as here. Thus, the first *Chevron* factor points to nonretroactivity.

The second *Chevron* factor requires us to consider whether retroactive invalidation of the statute will "further or retard [the] operation" of the Commerce Clause principles invoked in *Coons I*. The district court reasoned in this regard: "The purpose of the constitutional rule which governs this case is to free interstate commerce from the burdens which might be imposed by the individual states through which that commerce flows. Retroactive application of *Coons I* furthers that objective: prospective application defeats it." 598 F. Supp. at 971

Assuming arguendo that the district court correctly stated the purpose of the Commerce Clause rule in this case, we think the burden on interstate commerce that it perceived might result from nonretroactive application of that rule is largely illusory. In the absence of a showing of actual prejudice

to Searle due to plaintiffs' delay in filing suit after the normal limitations period had run,[9] it is difficult to see how nonretroactivity will burden interstate commerce. Had there been no tolling statute, the probability is that the Cohns and other plaintiffs similarly situated would have filed suit within the two-year statutory period. Thus, making the statute nonretroactive leaves the parties where they would have been without the tolling statute and adds no burden to interstate commerce.

Finally, equitable considerations also point to nonretroactive application. As in *Chevron*, "[i]t would . . . produce the most 'substantial inequitable results'. . . to hold that [plaintiff] 'slept on his rights' at a time when he could not have known the time limitation that the law imposed upon him. . . . [N]onretroactive application simply preserves his right to a day in court." 404 U.S. at 108. By contrast, as noted above, Searle has pointed to no prejudice resulting to it from plaintiffs' reliance on the tolling statute. Admittedly, this conclusion is tempered somewhat by the fact, relied on by the district court, that the applicability of the tolling statute to foreign corporations subject to long-arm service was in doubt until well after plaintiffs filed their complaint. However, plaintiffs' apparent interpretation of the statute as applying to such defendants had support in the case law, *see Whalen v. Young*, 28 N.J. Super. 543,

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9. The New Jersey Supreme Court has held that, even where the claim is timely under the tolling tatute, "[i]f a plaintiff's delay is inexcusable and has resulted in prejudice to the defendant, the latter may raise the equitable defense of laches to bar the claim." *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, ___, 416 A.2d 372, 378 n.10 (1980). Searle is, of course, free to raise this defense on remand.

101 A.2d 64 (1953) (limitations period tolled against corporate defendant subject to jurisdiction under nonresident motorist statute), *rev'd on other grounds*, 15 N.J. 321, 104 A.2d 678 (1954); *contra Ferraro v. Ferro Trucking Co.*, 72 N.J. Super. 519, 179 A.2d 74 (1962) (same circumstances--no tolling); *cf. Fidelity Deposit Co. v. Abnagle*, 97 N.J. Super. 132, 234 A.2d 511 (1967) (individual defendant, long-arm jurisdiction--tolling); *Lakovic v. New England Paper Tube Co., Inc.*, 127 N.J. Super. 394, 317 A.2d 426 (1974) (criticizing *Ferraro*), and was ultimately vindicated. *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980). Under these circumstances, this arguable lack of caution on plaintiffs' part should not obscure the fundamental inequity of retroactively shortening the period of limitations applicable to their action. We do not think that a tolling statute now held to be unconstitutional entitles Searle to gain the benefits of the declaration of unconstitutionality to the exclusion of a pending suit filed in reliance on the statute.

IV.

Searle argues, however, that the *Chevron* balancing test is inappropriate here. Citing *United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971), and *New York v. Cathedral Academy*, 434 U.S. 125 (1977), it argues that any holding that the New Jersey tolling statute violates the Commerce Clause must necessarily apply retroactively, regardless of any equitable or other considerations to the contrary.

In *Marino v. Bowers*, 657 F.2d 1363 (3d Cir. 1981) (in banc), we rejected a similar argument that "a ruling dealing with fundamental personal rights should never be limited to prospective application." *Id.* at 1365-66. We noted numerous instances in which the Supreme

Court as well as this court had given nonretroactive effect to constitutional rulings in civil as well as criminal cases. Id. at 1366; *see also, e.g., Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2880 (1982) (applying *Chevron* test to determine that holding invalidating grant of jurisdiction to bankruptcy judges under Article III should apply nonretroactively). Thus, there can be no disputing that the *Chevron* test is generally applicable to issues of retroactivity, at least in civil cases.

Nor do the two cases cited by defendant persuade us to carve out an exception to *Chevron* in this case. *U.S. Coin & Currency* holds merely that where the Constitution is held to immunize certain conduct from criminal punishment, as under the self-incrimination clause of the Fifth Amendment, such a holding necessarily operates retroactively. That principle has no applicability here.

Cathedral Academy is also inapposite. That case arose out of a New York statute (ch. 138) authorizing the use of state funds to reimburse private schools, including sectarian schools, for certain educational services. After a three-judge court held that ch. 138 violated the Establishment Clause and enjoined any further payments under it, the state legislature enacted a second statute (ch. 996) authorizing reimbursement for services performed in reliance on ch. 138 before its invalidation. In *Cathedral Academy*, the Supreme Court held that payments under ch. 996 also violated the Establishment Clause. The Court noted that the statute was enacted in clear violation of the district court's decree, but held that the dispositive fact was that payments under ch. 996, like those under ch. 138, "will of necessity either have the primary effect of aiding religion, ... or will result in excessive state involvement in religious affairs." 434 U.S. at 132 (citations omitted).

Whatever *Cathedral Academy* may teach us about retroactivity in the First Amendment context,[10] we are convinced that the decision does not preclude application of the *Chevron* retroactivity test where the retroactivity issue arises under the Commerce Clause. The balancing of state and national interests appropriate under the Commerce Clause, *see, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), contrasts sharply with the strict Establishment Clause analysis undertaken in *Cathedral Academy*, and is consistent with the balancing required by *Chevron*. We therefore conclude that the *Chevron* test is the appropriate one in this case.

V.

Finally, Searle argues that, even if the invalidation of the tolling statute is to be given general nonretroactive effect, we must nevertheless give it the benefit of the tolling statute's invalidation in order to avoid rendering an advisory opinion and to give it the fruit of its efforts to change the law.

We have previously rejected the view that Article III does not permit a federal court to declare a new rule of law to be applied purely prospectively. *Ettinger v. Central Penn National Bank*, 634 F.2d 120, 122-24 (3d Cir. 1980). But considerations of Article III power do not end the matter: the fact that we *may* constitutionally do something does not entail that we ought to do it. As a matter of judicial policy, we recognize that the benefits of a new legal principle should normally go to the litigant but for whom the issue would not have come to the court's attention. It is

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10. Neither the Supreme Court nor the lower court in *Cathedral Academy* cited *Chevron* or discussed the retroactivity doctrine.

fundamental to our jurisprudence that change in the law, at least in the courts, comes only through the efforts of individual litigants, motivated not by an academic concern for doctrinal correctness but by simple self-interest. *See Stovall v. Denno*, 388 U.S. 293, 301 (1967).

It does not follow, however, that application of the new legal principle to the litigants is appropriate under all circumstances, regardless of any other considerations. In *England v. State Board of Medical Examiners*, 375 U.S. 411, 419 (1964), for example, the Court refused to apply its holding in the case to the parties before it when to do so would have irremediably prejudiced the party who had reasonably relied on prior law. By contrast, in *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969), in which this court overruled its previous approval of "manufactured" diversity of citizenship as a basis for federal jurisdiction, we applied the new rule to the parties only after finding that the litigant who had relied on our prior approval of manufactured diversity could still institute an action in state court within the period of limitations. The equitable considerations discussed above--plaintiffs' actual reliance on the tolling statute, the lack of actual prejudice to Searle, and the irremediable nature of a dismissal--also support prospectivity here.

VI.

We hold, therefore, that the district court erred in applying retroactively its holding that the New Jersey tolling statute violated the Commerce Clause. We reiterate that we express no view as to the constitutionality *vel non* of the tolling statute. The judgment of the district court will be vacated and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

COURT OF APPEALS' ORDER ON RECONSIDERATION

United States Court of Appeals

FOR THE THIRD CIRCUIT

NO. 85-5048

SUSAN COHN and WALTER COHN,
her husband,

Appellants

v.

G.D. SEARLE & CO.,

Appellee

IRWIN I. KIMMELMAN, ESQ.,
Attorney General of New Jersey,

Intervenor

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 74-0450)

PRESENT: SEITZ, WEIS and ROSENN, Circuit Judges.

ORDER

The court having read the petition for panel rehearing and the answer thereto and having concluded that the resolution of the factual issue as to whether plaintiff actually relied on the tolling provision of the New Jersey statute would not alter its ultimate conclusion, it is

ORDERED that the petition for panel rehearing is denied, and it is

FURTHER ORDERED that the slip opinion in this case is modified in the following respects:

Delete carryover paragraph on pp. [27A-28A] and replace with the following:

Assuming arguendo that the district court correctly stated the purpose of the Commerce Clause rule in this case, we think the burden on interstate commerce that it perceived might result from nonretroactive application of that rule is largely illusory. Certainly, any inhibiting effect the statute might have had on foreign corporations and others contemplating doing business in New Jersey vanishes once the statute is invalidated, whether or not that invalidation is retroactive. Moreover, had there been no tolling statute, the probability is that the Cohns and most other plaintiffs similarly situated would have filed suit within the two-year statutory period. Although it is possible that prospective invalidation will permit maintenance of some suits that would not have been timely filed absent the tolling statute, we do not think that this slight marginal burden, if any, does violence to the Commerce Clause.[9]

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9. The New Jersey Supreme Court has held that, even where the claim is timely under the tolling statute. "[i]f a plaintiff's delay is inexcusable and has resulted in prejudice to the defendant, the latter may raise the equitable defense of laches to bar the claim." *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, ___, 416 A.2d 372, 378 n.10 (1980). Searle is, of course, free to raise this defense on remand.

Delete fourth sentence in first full paragraph on page [28A], beginning "By contrast . . . ."

Delete last sentence in Part III on page [29A] and replace with the following:

Accordingly, we conclude that the three *Chevron* factors point to a holding of nonretroactivity.

Delete material in first full paragraph on page [32A] following "By contrast, . . ." and replace with the following:

By contrast, in *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969), in which this court overruled its previous approval of "manufactured" diversity of citizenship as a basis for federal jurisdiction, we applied the new rule to the parties before the court only after finding that dismissing the action on that basis would not result in irremediable harm to the plaintiff who could still institute an action in state court. *Id.* at 876. *See also id.* at 877 (similar analysis to apply to all cases involving causes of action arising before the date of the decision). Dismissal of plaintiffs claim here would, of course, forever bar it. And permitting the case to go forward will not prejudice Searle's defense on the merits. In addition, we note that affirming the district court's dismissal of the suit on the ground that Searle is entitled to the benefit of its constitutional attack on the statute would have the paradoxical effect of denying plaintiffs the benefit of *their* successful appeal on the issue of retroactivity. In sum, the circumstances of this case do not warrant excepting Searle from the generally applicable rule we announce today.

By the Court,

/s/ SEITZ

Circuit Judge

DATED: March 12, 1986

DISTRICT COURT OPINION
598 F.Supp. 965

Susan COHN and WALTER Cohn, her husband, Plaintiffs,

v.

G.D. SEARLE & CO., Defendant.

Civ. A. No. 74-450.

United States District Court,
D. New Jersey.

Dec. 7, 1984.

DEBEVOISE, District Judge.

Procedural History

Plaintiffs, Susan and Walter Cohn, who are husband and wife, instituted this action in the New Jersey Superior Court against defendant G.D. Searle & Co. The complaint alleges that Susan Cohn suffered a stroke and that the stroke was caused by her use of an oral contraceptive manufactured by Searle.

Susan Cohn's stroke occurred in 1963. In late 1969 or 1970 plaintiffs became aware that there may have been a causal link between use of the contraceptive and the stroke. Suit was instituted in 1974, more than ten years after the stroke and approximately four years after plaintiffs became aware of the possibility of a causal relationship between the stroke and Searle's contraceptive.

After removing the case to this court Searle moved for summary judgment based upon New Jersey's 2-year statute of limitations. N.J.S.A. 2A:14-2. Plaintiffs resisted the motion, relying on N.J.S.A. 2A:14-22 which tolls the statute of limitations for a cause of action against a foreign corporation that "is not represented" in New Jersey "by any person or officer upon whom summons or other original process may be served." Judge Meanor, to whom the case was then assigned, granted

Searle's motion, ruling that the tolling provision was invalid under the Equal Protection Clause and that, therefore, the 2-year statute of limitations barred plaintiffs' action. *Cohn* v. *G.D. Searle & Co.*, 447 F.Supp. 903 (D.N.J.1978).

Plaintiffs appealed. The Court of Appeals reversed, holding that there was a rational basis for the tolling provisions and that consequently the New Jersey statute does not violate the Equal Protection Clause. *Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801 (3d Cir.1980).

The United States Supreme Court granted certiorari. It too concluded that the New Jersey statute does not violate the Equal Protection Clause. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 102 S.Ct. 1137, 71 L.Ed.2d 250 (1982). In a footnote it addressed Searle's due process contentions. As to the argument that the tolling statute violates due process by unfairly and irrationally denying certain foreign corporations the benefit of the statute of limitations without furthering any legitimate societal interest, the Court stated that "this due process argument is nothing more than a restatement of [Searle's] equal protection claim." 455 U.S. at 412, n. 7, 102 S.Ct. at 1143, n. 7. Because it was not raised in the Court of Appeals the Court declined to address Searle's other due process argument, namely, that it was deprived of due process because it could obtain the benefit of New Jersey's statute of limitations only by appointing an agent to accept service, and that such appointment would subject it to suit in New Jersey when there otherwise would not be the minimum contacts required for suit. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

The Supreme Court discussed but did not decide the question whether the tolling provision violates the Commerce Clause. It did not resolve this issue for two reasons. First, neither the district court nor the Court of Appeals addressed the question directly, although in a footnote the district court suggested that the tolling provision would violate the Com-

merce Clause. 447 F.Supp. at 911, n. 17. Second, it was unclear under New Jersey law whether the tolling statute required a corporation to register to do business in New Jersey pursuant to N.J.S.A. 14A:13-2 in order to obtain the benefit of the statute of limitations or whether the mere appointment of an agent would suffice.

In view of the unsettled state of New Jersey's law, the Court remanded the case to the Court of Appeals so that it might "determine whether [Searle's] Commerce Clause argument, if it was properly raised below, has merit." 455 U.S. at 414, 102 S.Ct. at 1144. The Court of Appeals remanded the case to this court for a decision on the validity of the tolling statute under the Commerce Clause. *Hopkins v. Kelsey-Hayes, Inc.*, 677 F.2d 301 (3d Cir.1982).

In 1982, after remand, Searle moved for summary judgment on the ground that the tolling statute is unconstitutional under the Commerce Clause and also on the due process ground which it raised but which was not decided by the Supreme Court. The Attorney General of New Jersey moved to intervene and cross-moved for summary judgment. Judge Meanor granted the intervention motion. Plaintiffs joined in the Attorney General's cross-motion. Judge Meanor stayed proceedings until final disposition of a New Jersey case which required that the State Supreme Court decide what action a foreign corporation must take in order to escape the tolling effect of N.J.S.A. 2A:14-22.

The New Jersey Supreme Court has now eliminated any ambiguity which may have existed in the tolling statute. In *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983) it held (i) that foreign corporations may designate an agent for service of process only by obtaining a certificate of authority to do business; (ii) the tolling statute is a forced licensure provision and as such is in violation of the Commerce Clause; and (iii) the decision would be given retrospective

effect, making it applicable to all matters that had not reached final judgment at the time of that decision.

Thereafter the plaintiff in *Coons*, supported by numerous *amici curiae* (including the plaintiffs in the instant case), filed a petition for rehearing on all issues. The Court granted the petition, limited to the retroactivity issue. After rehearing and further consideration it changed its position on retroactivity and a majority of the Court ruled: "We now hold as a matter of state law that *Coons I* is to be applied prospectively only, from the date of that decision, August 3, 1983." As further explicated by the Court, "... the statute of limitations as to foreign, unrepresented corporations commences to run as of [August 3, 1983]." *Coons v. American Honda Motor Co., Inc.*, 96 N.J. 419, 422, 435, 476 A.2d 763 (1984).

Although the New Jersey Supreme Court decided only the state law retroactivity question, it discussed both state and federal cases and proceeded as if state law and federal law on the subject were "inspired by the same considerations." 96 N.J. at 426, 476 A.2d 763.

There is now pending in the United States Supreme Court a petition for a writ of certiorari to review the decision in *Coons II*. That Court will, of course, finally decide the issues now before us, but in view of the importance of this case to both parties and in view of the long delay to which the case has already been subjected, I believe I should rule on the same issues raised by the pending motions in light of *Coons I and II*.

Conclusions of Law

There can be no question that the New Jersey Supreme Court has decided definitively the meaning of N.J.S.A. 2A:14-22, which tolls the running of the statute of limitations against foreign corporations which are not "represented" in New Jersey. It held in *Coons I* "that a foreign corporation must

obtain a certificate to do business in this state, under N.J.S.A. 2A:13-4, in order to achieve 'representation' in the context of N.J.S.A. 2A:14-22." 94 N.J. at 309, 463 A.2d 921.

Two questions of pertinence to the present case remained after the New Jersey Supreme Court decided the statutory question: (i) Does N.J.S.A. 2A:14-22, as so interpreted, unconstitutionally burden interstate commerce? and (ii) If it is concluded that N.J.S.A. 2A:14-22 does unconstitutionally burden interstate commerce, should such a conclusion be applied retroactively or prospectively? In *Coons I* the New Jersey Supreme Court held that as a matter of federal law the statute does unconstitutionally burden interstate commerce by requiring a foreign corporation engaged exclusively in interstate commerce to obtain a certificate to do business in order to gain the advantage of the statute of limitations. In *Coons II* the New Jersey Supreme Court held that as a matter of state law, its holding of unconstitutionality should be applied prospectively.

[1] A. *Applicable Law:* Both parties agree that federal law governs the question of the constitutionality of N.J.S.A. 2A:14-22. Since this is a federal question the issue must ultimately be decided by the United States Supreme Court. Although the decision of the New Jersey Supreme Court applying federal law to the question is both persuasive and instructive it is not binding, and under the mandate of the United States Supreme Court and the Court of Appeals I am required to make an independent determination of the constitutionality of the tolling statute under the Commerce Clause.

Plaintiffs urge strenuously that I am bound by the decision in *Coons II* that, assuming the unconstitutionality of the tolling statute, the constitutional determination is to be applied prospectively and not retroactively. However the cases cited by plaintiffs involve interpretation of state statutes and the effect to be given to changes in state law, not, as in the present case, the question of the retroactivity of federal constitutional decisions.

It would be difficult to reconcile rationally a holding that federal law will be applied to determine the constitutionality of a statute but that the states remain free to determine under state law when and how the ruling of unconstitutionality will be applied. Such a rule would provide a tool for nullification of constitutional decisions and does not constitute current law. For example, the United States Supreme Court reviews state court decisions on the retroactivity of new federal constitutional protections for criminal defendants, thus holding by clear implication that federal law controls. *Brown v. Louisiana,* 447 U.S. 323, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980). Federal law governs the retroactivity question in this case.

The New Jersey Supreme Court did not even purport to apply federal law when deciding the retroactivity question. Therefore, while *Coons II* may be instructive by way of analogy, it does not address the federal question implicated in the present motions.[1]

[2] B. *Burden on Interstate Commerce:* I conclude that the New Jersey Supreme Court correctly decided that interstate commerce is unconstitutionally burdened by the requirement that in order to avoid the effect of N.J.S.A. 2A:14-22 a foreign corporation must qualify to do business in New Jersey. The United States Supreme Court has held repeatedly that a state cannot discriminate against a foreign corporation engaged in interstate commerce merely because it has failed to qualify to do business in that state. *E.g., Allenberg Cotton Co. v. Pittman,* 419 U.S. 20, 95 S.Ct. 260, 42 L.Ed.2d 195 (1974). This is just what New Jersey's tolling statute does. *Coons I* discusses in some detail application of the pertinent constitutional principles

[1] I appreciate that another judge in this district concluded that *Coons II* governs the retroactivity question. *Hopkins v. Kelsey-Hayes,* Civil Action No. 78-1646. For the reasons set forth above I do not agree.

to N.J.S.A. 2A:14-22, 94 N.J. at 316-318, 463 A.2d 921, arriving at a conclusion with which I agree.[2]

[3] C. *Retroactivity of Ruling of Unconstitutionality:* As stated above, the question whether a ruling that New Jersey's tolling statute is unconstitutional should be applied retroactively is a federal, not a state law question. The New Jersey Supreme Court did not address the federal question. In my opinion, applying federal law, the determination that the statute is unconstitutional must be given retroactive effect and should be applied, at the very least, to the instant case. The New Jersey Supreme Court concluded, as have I, that N.J.S.A. 2A:14-22 imposes an impermissible burden on interstate commerce. That being the case, the burden should be lifted. A rule giving prospective effect to the decision of unconstitutionality permits this burden on commerce to perpetuate itself into the future. Thus if *Coons II* is accepted, foreign corporations engaged solely in interstate commerce will not be able to raise a limitations defense in future actions filed in New Jersey for two or six years from August 3, 1983 (depending on whether the action sounds in tort or asserts a property claim). This defeats the constitutional ruling striking down an impermissible burden on commerce. *Cf., New York v. Cathedral Academy,* 434 U.S. 125, 98 S.Ct. 340, 54 L.Ed.2d 346 (1977); *Lemon v. Kurtzman,* 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973); *United States v. U.S. Coin & Currency,* 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971).

Plaintiffs urge that application of the balancing test articulated in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) would require prospective application

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[2] Having decided that N.J.S.A. 2A:14-22 is unconstitutional on Commerce Clause grounds, it is unnecessary to address the Due Process grounds which Searle advances here and which were not dealt with in footnote 7 of the Supreme Court's opinion. *G.D. Searle & Co. v. Cohn,* 455 U.S. 404, 412, 102 S.Ct. 1137, 1143, 71 L.Ed.2d 250 (1982). Further, I am not at all sure that the Court of Appeals mandate authorizes me to go beyond the Commerce Clause issue.

of the constitutional ruling. I do not agree. I am not at all sure that a balancing test is called for in a situation such as this where there is an immediate burden on commerce of an extensive and pervasive nature. However, even if the balancing test is applicable, it would not call for prospective application of the ruling of unconstitutionality in this case.

In *Chevron* the Court noted that it had recognized the doctrine of non-retroactivity outside the criminal area in both consitutional and non-constitutional cases. It stated:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e.g., Hanover Shoe v. United Shoe Machinery Corp., supra* [392 U.S. 481], at 496 [88 S.Ct. 2224, 2233, 20 L.Ed.2d 1231 (1968)], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g., Allen v. State Board of Elections, supra* [393 U.S. 544], at 572 [89 S.Ct. 817, 835, 22 L.Ed.2d 1 (1969)]. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker, supra* [381 U.S. 618], at 629 [85 S.Ct. 1731, 1738, 14 L.Ed.2d 601 (1965)]. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma, supra* [395 U.S. 701], at 706 [89 S.Ct. 1897, 1900, 23 L.Ed.2d 647 (1969)].
>
> None of these factors are present in the instant case.

In *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) (a criminal case) the Court explained that the initial *Chevron* test (applicable to civil cases) required a determination that the decision be a "clear break" with past

law. Such a determination may be made only if a decision "[1] explicitly overrules a past precedent of [the court]; or [2] disapproves a practice [the court] arguably has sanctioned in prior cases; or [3] overturns a longstanding and widespread practice to which [the court] has not spoken, but which a near-unanimous body of lower court authority has expressed approval." 457 U.S. at 551, 102 S.Ct. at 2588.

The decision in *Coons I* does not meet *Chevron's* first criterion either as stated in *Chevron* or as explicated in *Johnson.* It was well established as a matter of federal law that a state may not discriminate against a foreign corporation engaged in interstate commerce merely because it has failed to qualify to do business in that state. There has always been the likelihood that N.J.S.A. 2A:14-22 had just that effect. At the most there was confusion on the subject, see the New Jersey Supreme Court's discussion of this confusion in *Coons II,* 96 N.J. at 432-433, 476 A.2d 763. While, according to the New Jersey Supreme Court, *Coons I* was new law, it "did not literally alter precedent because there was none on the *holding* of the case." 96 N.J. at 433, 476 A.2d 763. Thus *Coons I* insofar as it interpreted N.J.S.A. 2A:14-22 was not a clear break with past law. It decided questions as to which there had been confusion and controversy.

The second *Chevron* criterion requires that the court look at the history and purpose of the rule and determine whether retrospective operation will further or retard its operation. The purpose of the constitutional rule which governs this case is to free interstate commerce from the burdens which might be imposed by the individual states through which that commerce flows. Retroactive application of *Coons I* furthers that objective; prospective application defeats it.

As to the third criterion, general equitable considerations must be weighted. In the present case plaintiff Susan Cohn suffered a stroke in 1963. Walter R. Cohn, her husband, is both a co-plaintiff and the attorney for himself and his wife. By

1970, as found by Judge Meanor, he knew that his wife had had a cerebral vascular accident which may have been caused by Searle's contraceptive. That knowledge would, under usual circumstances, have started the statute of limitations running. By April 1970 he had compiled a medical-legal file. He asserts that he ascertained that Searle did not have an agent in New Jersey for purposes of service of process and that he relied on the fact and the tolling statute when he decided to defer filing suit until 1974. His reasons for waiting, he claims, were his desire to obtain more concrete medical information as to the causal connection and his wife's emotional and psychological condition at the time.[3]

This is a tragic situation, but one which plaintiffs could readily have avoided by commencing an action within two years of 1970 when they discovered the causal relationship. In 1970 the scope and effect of the tolling statute was not at all clear. At that time there was case law which suggested that circumstances other than qualifying to do business in New Jersey would avoid the effect of the tolling statute. For example, one court suggested that the tolling statute would not govern an action in which the foreign corporation was subject to service of process under R.S. 39:7-2, which provided for service on foreign corporations and others by serving the Director of Motor Vehicles in suits arising out of automobile accidents occurring in New Jersey. Further, it was urged that the tolling statute should not apply to any foreign corporation that was amenable to the personal jurisdiction of the New Jersey courts through application of the long-arm rule or otherwise.

Although *Whalen v. Young*, 28 N.J.Super. 543, 101 A.2d 64 (Law Div.1953) held that R.S. 39:7-2 permitting service on

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[3] These facts are set forth in an affidavit of Walter R. Cohn sworn to on November 16, 1983 and apparently submitted to the New Jersey Supreme Court. A copy of the affidavit was attached to plaintiffs' brief in opposition to Searle's motion for summary judgment.

the Director of Motor Vehicles did not serve to avoid the effect of the tolling statute, exactly the opposite result was reached in 1962, when a trial court held that in such a situation a foreign corporation was represented in New Jersey and an action against it was not affected by the tolling statute. *Ferraro v. Ferro Trucking Co.*, 72 N.J.Super. 519, 179 A.2d 74 (Law Div. 1962). The language of the court in *Ferraro* emphasizing that the foreign corporation was amenable to service of process at all times and that statutes of limitation serve important policy goals should have alerted the careful attorney that there were risks entailed in relying on N.J.S.A. 2A:14-22 in any situation where a foreign corporation was subject to service under New Jersey's court rules or statutes.

In the present case Searle was amenable to service of process at all times under N.J.Ct.Rule 4:4-4(c)(1) either by service upon one of Searle's detail persons visiting New Jersey doctors and hospitals or by mailing process to its principal place of business under the long-arm provision of the Rule. *See Avdel Corp. v. Mecure*, 58 N.J. 264, 277 A.2d 207 (1971). Prior to 1980 respectable legal authorities urged that the statute tolling the limitations periods within which actions could be brought against foreign corporations unrepresented in New Jersey did not apply to foreign corporations which were amenable to long-arm service. That position was rejected in *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), a case decided long after plaintiffs in the present case instituted their action. However, in 1970, when plaintiffs became aware of a possible cause of action against Searle, there was no assurance that views like those expressed by the dissenting Justices in *Velmohos* would not be adopted in New Jersey:

> I would construe N.J.S.A. 2A:14-22 to toll the statute of limitations as to a foreign corporation against which there is a cause of action in this State only in a situation where such corporation is not amenable to personal jurisdiction.

Defendant corporations were subject to long-arm jurisdiction in this State at all relevant times as found by the trial court. See R. 4:4-4(c)(1). Indeed, service was made upon them pursuant to the rule. To hold that despite this, a plaintiff can sit back for any number of years and file suit at his pleasure against such foreign corporations, is to do violence to the concept of limitations of actions. The construction placed upon N.J.S.A. 2A:14-22 by the majority opinion, while following the literal language of the statute, frustrates the very purpose of the tolling provision and places this Court with a minority of jurisdictions. See Annotation, *"Tolling of statute of limitations during absence from state as affected by fact that party claiming benefit or limitations remained subject to service during absence of nonresidence,"* 55 A.L.R.3d 1158 (1974). As noted in the annotation, a majority of courts have refused to give application to tolling provisions when the party claiming the benefit of limitations has remained amenable to personal jurisdiction.

A recent comment in 10 Seton Hall L.Rev. 585 (1980) entitled "The Tolling Provision of the Statute of Limitations—a Haven for the Dilatory Plaintiff," makes a critical analysis of N.J.S.A. 2A:14-22 and the position now taken in the majority opinion and rejects it on constructional as well as constitutional grounds. The comment concludes by stating that "[a] statute that serves to placate the dilatory plaintiff while denying an important right to a nonresident defendant is an anomaly in a jurisdiction noted for progressive developments in the law corresponding to the changes in the circumstances to which the law applies." *Id.* at 613. Despite the rigidity of some tolling and limitations statutory provisions, this Court has always construed them to effectuate the true statutory purpose. See, *e.g., Galligan v. Westfield Centre Service, Inc.*, 82 N.J. 188 [412 A.2d 122] (1980); *White v. Violent Crimes Compensation Board*, 76 N.J. 368 [388 A.2d 206] (1978). It has not done so today.

Although I find it unnecessary to reach the issue, the statutory construction of N.J.S.A. 2A:14-22 adopted by the majority also raises substantial questions of due process and equal protection of the laws. I would reverse the

Appellate Division and reinstate the judgment of the trial court dismissing the complaint.

83 N.J. at 197-199, 416 A.2d 372. New Jersey attorneys should, therefore, have been aware of the constitutional and interpretive risks of reliance on the tolling provisions of N.J.S.A. 2A:14-22.

The dissenting opinion of three Justices in *Coons II* would have held that under state law "[i]rrespective of the general retroactivity of the *Coons I* decision, there should be no question that those responsible for effecting the change in law should benefit by their efforts"; else there would be no incentive for private attorneys to challenge existing possibly unconstitutional laws. 96 N.J. at 436, 476 A.2d 763. Searle was among those who were considered to have effected a change in the law. One of these dissenting Justices, Justice Garibaldi, went further and urged that even under state law *Coons I* should be given complete retroactive effect. She applied the first *Chevron* test (without reference to the gloss which *Johnson* may have put upon it) and concluded that *Coons I* established a new rule of law. However, she concluded, for certain of the reasons I have set forth above, that the second and third *Chevron* tests were not met.

Thus, although it is truly to be regretted that plaintiffs in this case will not have their day in court, the marginal equities in this case do not compel the conclusion that implementation of important constitutional principles should be deferred.

Searle's motion for summary judgment will be granted. The cross-motions for summary judgment of New Jersey's Attorney General and of plaintiffs will be denied.[4] Searle's attorneys are requested to present an appropriate form of order.

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[4] On September 18, 1984 New Jersey's Attorney General wrote to the court advising that "[i]n light of the decisions in *Coons I* and *II*, it no longer appears necessary for the Attorney General to participate in the present proceeding." Regardless of the Attorney General's non-participation, his and plaintiffs' cross-motions for summary judgment are still pending and should be disposed of.

COURT OF APPEALS
REMAND ORDER
677 F.2d 301

Roy HOPKINS, Appellee in No. 79-1881,

v.

KELSEY-HAYES, INC., Appellant in No. 79-1881.

Susan COHN and Walter Cohn, her husband, Appellants in No. 79-2406,

v.

G. D. SEARLE & COMPANY, Appellee in No. 79-2406.

Nos. 79-1881, 79-2406.

United States Court of Appeals, Third Circuit.

April 22, 1982.

Before ADAMS, VAN DUSEN and GARTH, Circuit Judges.

OPINION OF THE COURT

GARTH, Circuit Judge.

In *Cohn v. G. D. Searle & Co.*, 628 F.2d 801 (3d Cir. 1980), *rev'g* 447 F.Supp. 903 (D.N.J.1978), we held that New Jersey's tolling statute, *see* 2A N.J.Stat.Ann. § 14-22, which tolls the statute of limitations for claims against foreign corporations with no statutory or appointed agent in New Jersey,[1] does not violate the Equal Protection Clause of the Fourteenth Amend-

[1] In *Cohn*, the district court held that Searle was not "represented" by anyone in New Jersey for purposes of the tolling provision, and we affirmed that holding, which was not disputed before the Supreme Court. *See G. D. Searle & Co. v. Cohn*, ____ U.S. ____, 102 S.Ct. 1137, 71 L.Ed.2d 250 (1982).

ment. Thereafter, the Supreme Court of the United States affirmed our Equal Protection holding, *G. D. Searle & Co. v. Cohn*, ___U.S. ___, 102 S.Ct. 1137, 71 L.Ed.2d 250 (1982), but in so doing called attention to another constitutional issue—whether the tolling statute violates the Commerce Clause. Although Searle did raise the Commerce Clause issue in its brief before this court, the primary focus of the parties' arguments before us was the validity of the tolling statute under the Equal Protection Clause, and we did not address the subsidiary argument concerning the Commerce Clause in our opinion. Therefore, while affirming our Equal Protection ruling, the Supreme Court has now remanded the case to us for consideration of Searle's Commerce Clause argument.

In *Hopkins v. Kelsey-Hayes, Inc.*, 463 F.Supp. 539 (D.N.J.1978, aff'd by 628 F.2d 801(3d Cir.1980), the district court, confronted with the same Equal Protection argument as in *Cohn*, had held that the tolling statute did not violate the Equal Protection Clause. Because the two cases presented identical challenges to the tolling statute, we consolidated the appeal in *Hopkins* with that in *Cohn*, affirming the district court's judgment in the former, while reversing in the latter. Subsequently, the Supreme Court vacated our judgment in *Hopkins* and remanded the case for further consideration in light of the Court's earlier decision in *Cohn*. *See Kelsey-Hayes, Inc. v. Hopkins*, ____U.S.____, 102 S.Ct. 1605, 71 L.Ed.2d 844 (1982).

We think it best to remand both cases to the district court. In *Cohn*, the Commerce Clause contention was apparently not fully addressed in the district court, if indeed it was raised there at all or in the same context as it was before the Supreme Court.[2] Accordingly, we deem it appropriate that the district court be given the opportunity to develop the record as may be necessary to fully explore the various aspects of the Commerce Clause question.

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[2] *See*, ____ U.S. at ____, 102 S.Ct. at 1140; *Cohn v. G.D. Searle & Co.*, 447 F.Supp. 903, 911 n.17 (D.N.J.1978).

Unlike Searle, Kelsey-Hayes never designated a Commerce Clause question as an "issue presented" in its brief before this court. It did, however, include some references in the text of its Equal Protection argument which could be read as challenging the constitutionality of the New Jersey statute under the Commerce Clause. Still, the manner of the presentation of that issue to us on appeal did not appear to raise a Commerce Clause issue. Nor can we discern from the briefs submitted to us whether the Commerce Clause issue was raised in the district court in *Hopkins*. Inasmuch as we are remanding *Cohn* to the district court for further consideration of the Commerce Clause issue, however, we believe that it is appropriate that the same opportunity be given to Kelsey-Hayes to present its contentions regarding the Commerce Clause.

Accordingly, we will remand the cases in *Cohn v. G. D. Searle & Co.* and *Hopkins v. Kelsey-Hayes, Inc.*, to the district court for further proceedings consistent with the instructions in the Supreme Court's opinion in *G. D. Searle & Co. v. Cohn*, ___ U.S. ___, 102 S.Ct. 1137, 71 L.Ed.2d 250 (1982), and this opinion.